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No. 97-49

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

PORTLAND GENERAL ELECTRIC COMPANY,

Petitioner,

v.

COLUMBIA STEEL CASTING CO., INC.

Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Is a monopolist entitled to state action immunity when the state agency that determines on a case-by-case basis whether to permit utility monopolies did not authorize a monopoly for the City of Portland?

Is a monopolist entitled to state action immunity when that monopolist intentionally avoided the statutory process for seeking state authorization of its monopoly?

Is a monopolist entitled to state action immunity based solely on the regulatory oversight of a state administrative agency when that monopolist knew or had reason to know that it lacked a lawful monopoly under state law because it had intentionally modified an agreement that would have clearly applied for such a monopoly?

PARTIES TO THE PROCEEDING

In addition to the parties named in the case caption, the Public Utility Commission of Oregon was a defendant in the U.S. District Court. The Public Utility Commission did not seek rehearing at the Circuit Court and through entrance of an appearance only, the Commission waived its right to file a brief before this Court.

On July 1, 1997, Portland General Corporation (parent of the defendant Portland General Electric Company) merged, through an exchange of stock, with Enron Corporation. Enron Corporation is the surviving corporation, and hence the new parent corporation of defendant Portland General Electric Company.

Respondent Columbia Steel Casting Co., Inc. is privately owned and has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

STATEMENT OF THE CASE 1

A. Oregon Law Permits Only One Way For PGE And PP&L To Create Exclusive Service Territories 2

B. The City Opposed Exclusive Service Territories 3

C. In 1972, PGE And PP&L Agreed To An Exchange Of Facilities In Portland After The City Refused To Consent To Exclusive Service Territories 4

D. The Utilities Applied To The OPUC For (1) An Agreement To Exchange Facilities In Portland (Pursuant To ORS Chapter 757), Not A Territorial Allocation; and (2) A Transfer Of Territorial Allocations In Rainier, Oregon (Pursuant To ORS Chapter 758). 5

E. The OPUC Approved An Exchange Of Facilities, Not A Territorial Allocation In Portland 6

F. PP&L And The OPUC Did Not Believe That There Were Exclusive Service Territories In Portland 8

G. Even Into The 1990s, Both Utilities Doubted The Lawfulness Of Their Monopoly Service Territories 10

H. PGE Misrepresents Its Motivation For Settling With PP&L 11

REASONS FOR DENYING THE WRIT 12

I. The Rulings Below Were Neither Novel Nor Inconsistent With Supreme Court Rulings 12

A. The 1972 Order Did Not Sanction Anticompetitive Conduct 12

B. This Is Not A Question Of Active Supervision 15

C. OPUC's Post-1972 Actions Do Not Insulate PGE 16

D. The Lower Courts Did Not Violate Principles Of Full Faith and Credit 18

E. No Conflict Among The Circuits Exists . . 20

F. The Issues In This Case Arise Infrequently 22

G. The Result Is Fair 23

CONCLUSION 24

APPENDIX A-1

TABLE OF AUTHORITIES

Page

CASES

California Retail Liquor Dealers Ass'n
v. Midcal Aluminum, Inc.
445 U.S. 97, 100 S.Ct. 937 (1980) 12, 15-17

City of Columbia v. Omni Outdoor
Advertising, Inc.,
499 U.S. 365, 111 S.Ct. 1344 (1991) 13, 16, 17

Columbia Steel Casting Co., Inc. v. Portland
General Electric Co.,
111 F.3d 1427 (9th Cir. 1997) 2

Federal Trade Comm'n v. Ticor Title Ins. Co.,
504 U.S. 621, 112 S.Ct. 2169 (1992) 14-18

Goldfarb v. Virginia,
421 U.S.773, 95 S.Ct. 2004 (1975) 16

Lease Lights, Inc. v. Public Service
Company of Oklahoma,
849 F.2d 1330 (10th Cir. 1988) 21

Otter Tail Power Co. v. United States,
410 U.S. 366, 93 S.Ct. 1022 (1973) 18

Parker v. Brown,
317 U.S. 341, 63 S.Ct. 307 (1943) 18, 19

Patrick v. Burget,
486 U.S. 94, 108 S.Ct. 1658 (1988) 12

Praxair, Inc. v. Florida Power & Light Co.,
64 F.3d 609 (11th Cir. 1995), *cert. denied*,
__U.S.__, 116 S.Ct. 1678 (1996) 20, 21

Southern Motor Carriers Rate
Conference, Inc. v. United States,
471 U.S. 48, 105 S.Ct. 1721 (1985) 14-17

Town of Hallie v. City of Eau Claire,
471 U.S. 34, 105 S.Ct. 1713 (1985) 18, 19

STATUTES

Or. Admin. R. 860-25-010 12

Or. Rev. Stat. [ORS] 757.480(1) 3

ORS 758.400 3

ORS 758.405 3

ORS 758.410 12

ORS 758.410(1) 2

ORS 758.420 2

ORS 758.425(1) 2, 13

ORS 758.435 3

ORS 758.440 3

ORS 758.440(1) 13

ORS 758.450(1) 3

ORS Chapter 757 . . . . . 3, 5, 6

ORS Chapter 758 . . . . . 2, 3, 5, 6, 18

RULES

Fed. R. Civ. P. 38(d) 23

OTHER

Benjamin J. Holden, *Electric-Deregulation Machine Picks Up Steam,* Wall St. J., July 14, 1997, at B4 22

P. Areeda & D. Turner, I *Antitrust Law* ¶ 214e (1978) 14

STATEMENT OF THE CASE[1]

Petitioner Portland General Electric Company's (PGE) arguments depend on the unique facts of this case, but the facts do not support PGE's cause. Oregon's territorial allocation statute establishes the sole process by which the Oregon Public Utility Commission (OPUC) may approve the allocation of exclusive utility service territories. The OPUC's 1972 Order at issue in this case never gave such approval to PGE because, as PGE admits, PGE and Pacific Power & Light Co. (PP&L) agreed with the Portland City Council to eliminate the notion of exclusive service territories from their Facilities Exchange Agreement (the Agreement). PGE asserts that the OPUC and the parties believed, as early as 1974, that exclusive service territories had been allocated. Even if, under this Court's precedent, those subjective beliefs were relevant, it simply is not true that PGE, PP&L and the OPUC believed exclusive territories had been granted. In other words, the conclusions reached through application of the objective standard by the courts below correspond perfectly with evidence of PGE's and the OPUC's subjective beliefs.

The courts have recognized two narrow exceptions to the normal rule that a state's intent to permit monopolization must be "clearly articulated and affirmatively expressed." One is where the state, through clear articulation, but imperfect execution, fails lawfully to establish the monopoly. The second is where the monopolist innocently relies upon the state's expression of the right to monopolize. PGE's ardent efforts to squeeze its facts into the exceptions are unavailing. On the unique facts of this case, neither exception applies to PGE.

PGE's position depends on its rendition of the facts. It is thus important for the Court to separate the facts of record from PGE's characterizations and *post hoc* rationalizations.

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[1] Respondent Columbia Steel Casting Co., Inc. (Columbia Steel) cannot accept PGE's statement of the case.

PGE also asks this Court to ignore Oregon law governing utility monopolies. An understanding of that law is crucial for the Court not to be misled.

A. Oregon Law Permits Only One Way For PGE And PP&L To Create Exclusive Service Territories.

PGE starts from this incorrect premise: ". . . the Court of Appeals and all the parties agree that the Oregon statute . . . clearly articulated and affirmatively expressed a state policy to displace competition" with regulation. Pet. at 16.[2] Columbia Steel does not agree, nor did the Court of Appeals agree. That Court noted, "the state's clearly articulated policy is to have the OPUC decide whether to sanction anticompetitive conduct." Columbia Steel Casting Co., Inc. v. Portland General Electric Co., 111 F.3d 1427, 1437 n.8. (9th Cir. 1997), PGE App. A-15.

The Circuit Court's description of Oregon law is accurate. Oregon Revised Statutes (ORS) Chapter 758 establishes a detailed procedure for securing an allocation of an exclusive service territory from the OPUC. Utilities may, but are not required to, enter into a contract "for the purpose of allocating territories and customers between the parties" and designating which utility has the exclusive right to serve which customers. ORS 758.410(1), PGE App. R-3. The contracting utilities must then promptly file the contract with the OPUC. ORS 758.420, PGE App. R-4. The OPUC may then approve or disapprove the contract as filed. ORS 758.425(1), PGE

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[2] Citations to documents appearing in the appendix submitted by PGE are abbreviated as "PGE App." Documents in Columbia Steel's appendix are cited as "CS App." For documents that are not included in an appendix, Columbia Steel cites to the appropriate numerical designation of that document in the U.S. District Court Clerk's Record (CR __). References to PGE's Petition for Certiorari are abbreviated as "Pet." with a citation to the appropriate page number.

App. R-5. The statute expressly states that an area "may only become an allocated territory" thorough this procedure.[3] ORS 758.450(1), PGE App. R-7.

In contrast, a separate chapter, ORS Chapter 757, requires utilities that sell or exchange facilities to obtain OPUC approval. ORS 757.480(1), PGE App. R-1. Chapter 757, expressly invoked by PGE in its OPUC application, grants no authority to create exclusive service territories.

Thus, there is *no* policy embodied in state statutes that pre-ordains the elimination of competition throughout the state. The statutory scheme *permits* utilities to apply under ORS Chapter 758 for exclusive territorial allocations *subject to* the OPUC's consideration, on a case-by-case basis, whether to permit exclusive service territories.[4] It is against this statutory yardstick that the actions of PGE must be measured.

B. The City Opposed Exclusive Service Territories.

Since 1961, when territorial allocation statutes were proposed in the Oregon legislature, the City of Portland (the City) had opposed the creation of exclusive service territories within Portland. The City Charter prohibited exclusive franchises, CR 72 Ex. W p.1, and the City's franchise to PP&L, PGE's only competitor in Portland, required competition

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[3] If a utility is the exclusive service provider in an area, then a different procedure applies. See ORS 758.435, 758.440 (PGE App. at R-5 through R-7). That procedure is not implicated in this case.

[4] The statement of legislative policy in ORS 758.405 underscores this point. It is the stated policy of the territorial allocation statutes to eliminate duplication of facilities. ORS 758.405 (PGE App. R-3). To accomplish that policy, the legislature declares that it is necessary to regulate in the manner set forth in ORS 758.400 *et seq.* -- that is, to permit the creation of exclusive service territories if the OPUC consents. Had the legislature intended to eliminate all competition, it would have said so.

throughout the City. CR 269 Ex. 95 pp. 2-3 ("The Grantee shall not . . . enter into any agreement in restriction of competition . . . .").

Prior to 1972, PGE and PP&L had tried to create exclusive service territories within the City. E.g., CR 269 Ex. 22, 35. Each time the City objected,[5] and PGE and PP&L abandoned their efforts.

C. In 1972, PGE And PP&L Agreed To An Exchange Of Facilities In Portland After The City Refused To Consent To Exclusive Service Territories.

In 1972, PGE and PP&L agreed to an exchange of electric facilities in Portland. Initially, they also apparently planned to obtain exclusive service territories to correspond to the facilities that were being exchanged. Prior to seeking approval of their Agreement from the OPUC, PGE and PP&L needed approval of the Portland City Council. They requested an ordinance acknowledging that they would establish areas to "be served exclusively" by the utilities. CR 269 Ex. 47 p.2. PGE concedes that, based on the City's longstanding opposition to monopoly utility service within the City and at the City Attorney's request, the utilities intentionally removed the word "exclusive" from their Agreement.[6] CR 269 Ex. 4 pp. 7-8 and Pet. at 4. With that change, the Portland City Council

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[5] See, e.g., CR 269 Ex. 26 (City's brief before OPUC relating to 1962 application by PGE). In 1965, the City consented to the limited creation of exclusive service territories in the core area of downtown Portland (miles from the location at issue in this case) in order to facilitate the underground installation of facilities. CR 269 Ex. 31 p. 2. The ordinance expressly consented to the creation of exclusive service territories in those unusual circumstances. Id.

[6] At all relevant times, Section 10-206 of the Portland City Charter provided "[n]o exclusive franchise shall be granted." CR 72 Ex W p.1.

approved the utilities' Agreement that provided for "the sale, transfer and exchange of plant and property" with the proviso: "both companies operate under non-exclusive franchises and . . . the obligation to supply properties within the City must remain binding upon both companies." CR 72 Ex. J p.1.

The parties agree on these facts. See Pet. at 4.

PGE and PP&L then filed their 1972 Agreement (with the words "be served exclusively" omitted) with the OPUC for approval. The application covered two separate matters.

D. The Utilities Applied To The OPUC For (1) An Agreement To Exchange Facilities In Portland (Pursuant To ORS Chapter 757), Not A Territorial Allocation; and (2) A Transfer Of Territorial Allocations In Rainier, Oregon (Pursuant To ORS Chapter 758).

Consistent with the words of the Agreement (as modified to obtain the City's necessary approval), the application sought approval of "the exchange of electric utility facilities in Multnomah County[7] . . ." and the "assignment to [PGE] of certain service territory in Columbia County,[8] Oregon previously allocated to [PP&L]." CS App. A-1 (Caption).

The application cited ORS Chapter 757 for authority to approve the exchange of facilities (CS App. A-1) and ORS Chapter 758 as authority for the transfer of a territorial allocation in Rainier, Oregon. CS App. A-11 ("Assignment of

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[7] The portions of Portland implicated in the ordinance are located entirely within Multnomah County, Oregon.

[8] Columbia County and the City of Rainier, Oregon are located roughly 60 miles northwest of Portland.

Service Territory"). While ORS Chapter 757 does indeed authorize transfers of utility property (PGE App. R-1) the authority to allocate exclusive service territory is confined to ORS Chapter 758, PGE App. R-2 to R-10.

E. The OPUC Approved An Exchange Of Facilities, Not A Territorial Allocation In Portland.

The OPUC's 1972 Order approving the Agreement is unambiguous. Consistent with the parties Agreement and the application, the 1972 Order approved the "application of [PP&L] to transfer certain of its exclusively served area allocated to it and lying in and around Rainier, Oregon . . . ." PGE App. J-9. The Order also permitted the transfer of utility assets within Portland from one utility to the other. PGE App. J-9, J-10. Yet the Order did not mention exclusive service territories for Portland--an omission that the Circuit Court found to be "glaring." PGE App. A-15. As the Circuit Court observed:

> Columbia Steel argues that PGE and PP&L intentionally introduced ambiguity into the 1972 Agreement in order to slip a monopolistic agreement past the city of Portland. We need not address this argument because, whether or not ambiguity was introduced into the contract for the self-serving purpose of making it less politically vulnerable, the utilities' failure to include the "exclusively served" language in the 1972 Agreement that had been included in the plan submitted to the city Council certainly had the *effect* of creating ambiguity in the 1972 Order.

PGE App. A-17, n. 11.

The transfer of customer accounts authorized under the 1972 Order was not an allocation of exclusive service territory, as PGE would have this Court believe. Once the ownership of

distribution facilities was transferred, the accounts of the customers connected to those facilities had to be transferred as well. But that transfer did not create an exclusive and perpetual right to serve those customers.

This distinction is important because the exchange of facilities was limited. Although PP&L and PGE exchanged many lines, poles and substations, PP&L retained ownership of its transmission line running through Columbia Steel's property, while PGE owned the distribution lines that served Columbia Steel. As a practical and legal matter, the exchange of facilities did not create in PGE the perpetual right to serve Columbia Steel (or any other customer).

It may not be assumed that the OPUC contemplated exclusive service territories by stating that the utilities' employees did not have a right to demand service from their respective employers, as PGE argues. The OPUC concluded that allowing only the utility employees to continue taking service from their employers would have been discrimination. PGE App. J-8. Discrimination is unlawful. PGE App. R-1. Had exclusive service territories been created, the OPUC presumably would not have invoked the proscriptions against unlawful discrimination in its 1972 Order.

Recognizing that the 1972 Order did not clearly sanction anticompetitive conduct, PGE contends that everyone understood that an exclusive service territory had been created. Pet. at 5-7. That understanding, according to PGE, is sufficient to confer antitrust immunity. While Columbia Steel disagrees with PGE's legal argument, PGE is demonstrably wrong on the facts. The District Court's record demonstrates that the regulators and the utilities themselves doubted the existence of a lawful exclusive service territory.

F. PP&L And The OPUC Did Not Believe That There Were Exclusive Service Territories In Portland.

A 1974 rate case involving PGE's co-conspirator, PP&L, raised the issue of competition in Portland. Charles Davenport, former vice president of PP&L, testified that he did not believe exclusive service territories existed in Portland: "I am unaware of a restriction on either utility that they cannot serve anywhere within the City they may choose to extend their facilities to." CR 269 Ex. 16 p.3. The OPUC shared his view.

PGE would excuse its monopolization as innocent and faithful compliance with the will of the OPUC. Again, PGE's argument mischaracterizes the actions of the OPUC. PGE offers isolated statements in OPUC orders from 1973 and 1974 to foster the misimpression that, for 20 years, the agency treated the two utilities as if they had been allocated lawful exclusive service territories. For example, Order 74-658 (PGE App. L), states that competition has been eliminated in Portland. That is correct; the utilities' conspiracy to divide markets had been successful. The order does not say, however, that perpetual and exclusive service territories had been allocated under Oregon law.

In fact, the OPUC held the opposite view. The OPUC staff filed a brief in the 1974 rate case stating that competition within the City was unlikely "[a]s an economic matter and as a practical matter. . . ." CR 269 Ex. 97 p.2. That assertion would make no sense unless the OPUC understood that Portland did not have exclusive service territories. Indeed, in the appeal of the rate case order, the OPUC urged that the OPUC Commissioner *could* limit service territories in Portland, implying that he had not yet done so. CR 269 Ex. 98 p. 3.

Richard Sabin, who signed both orders mentioned above, offered reliable perspective on the territorial allocation issue. He was the attorney for the OPUC in 1972, when the

Agreement was considered and the 1972 Order was issued. CR 266 Ex. 43 p.1. He later became Commissioner and held that post in 1974 during PP&L's rate case. Id. at 2. His affidavit was unequivocal: ". . . Order No. 72-870 was not intended to, and did not, constitute an allocation of service territory pursuant to the Oregon territorial allocation laws." Id. at 3. As to the 1974 rate case order, Commissioner Sabin testified, that order "was not intended to constitute an allocation of service territory pursuant to the territorial allocation statutes." Id. Order 73-688, also signed by Commissioner Sabin, does not even address whether PGE had a state-approved exclusive territorial allocation in Portland. PGE App. K.

Contrary to PGE's assertions, the OPUC did not insist that it had allocated exclusive service territories in Portland until a 1992 Order that came long after the causes of action in this case arose. Even that Order admits that "[n]either the utilities' [1972] Agreement nor the Commission's [1972] order mentions exclusive territories for the Portland exchange." PGE App. M-7. The 1990 letter reprinted at PGE App. U does not alter that conclusion. PGE claims that it refused to serve Columbia Steel "*following* this guidance from the state of Oregon" in the 1990 letter. Mr. Graham, the author of that letter, was not an OPUC Commissioner; he was one of its attorneys. He could not speak definitively for the state, nor announce state policy.

Moreover, PGE has misstated the sequence of the letter in relation to its assertion of the right to monopolize. The letter was issued April 16, 1990, *after* the two utilities had already refused to permit Columbia Steel to take service from PP&L. See CR 269 Ex. 80 (January 8, 1990 file memorandum from Steve Scott, account executive for PGE, noting PGE's refusal of Columbia Steel's request to take service from another utility); CR 269 Ex. 88 pp. 2-7, Ex. 89, Ex. 92 pp. 4-5 (Columbia Steel requested service from PP&L in 1987, PP&L contacted PGE about the request, and PP&L ultimately refused the request

based on the assertion that service territories had been allocated).

For 20 years, PGE and PP&L monopolized the energy market in Portland, knowing that they had altered their Agreement to remove the notion of exclusivity. Once exposed, PGE scrambled to offer *post hoc* rationalizations. But even the conspirators' own conduct belies PGE's claim that the monopolization was part of state policy.

G. Even Into The 1990s, Both Utilities Doubted The Lawfulness Of Their Monopoly Service Territories.

When Columbia Steel requested service from PP&L for the second time in late 1989, PP&L determined that it could no longer continue in the conspiracy to monopolize Portland. PP&L's Executive Vice-President (and later President) feared criminal antitrust liability. He told a PGE executive that if he refused to offer to serve Columbia Steel, "he needed to pick out the wallpaper for his cell." CR 269 Ex. 65 p.9. Clearly, as late as 1990, PP&L did not share PGE's purported universal belief that the two utilities were barred from competing.

In addition, PGE's own conduct undercuts its claim that it could not compete or transfer customers without prior OPUC approval. On May 2, 1991, PGE and PP&L entered into a settlement agreement. CR 269 Ex. 90. The Agreement provided that PP&L would begin furnishing service to Columbia Steel, and PGE would wheel PP&L power to Columbia Steel until PP&L could construct its own distribution facilities to serve Columbia Steel. Id. PGE began wheeling power to Columbia Steel in July 1991. PGE and PP&L did not even apply for permission to transfer the customer until October 2, 1991. PGE App. M-3. The two utilities did not secure OPUC approval for PP&L to serve Columbia Steel until April 1992. PGE App. M-29 to M-30.

PGE contends that the OPUC absolutely prohibited the two utilities from transferring customers from one utility to the other, yet the utilities transferred Columbia Steel without even asking for the OPUC's permission. Had PGE genuinely believed that allowing customers to switch utilities would violate exclusive territorial allocations or draw the wrath of OPUC, it would not have arranged for PP&L to serve Columbia Steel without prior OPUC approval.

H. PGE Misrepresents Its Motivation For Settling With PP&L.

PGE states that it entered into the settlement agreement because it "understood by then the direction in which the District Court was headed. . . ." Pet. at 10 n. 8. Again, PGE's *post hoc* rationalization materially misstates the sequence of events.

PGE and PP&L entered into the settlement agreement on May 2, 1991. CR 269 Ex. 90. On May 31, 1991, the District Court heard oral argument on the applicability of state action immunity. It did not issue its ruling on that issue until July 3, 1991. PGE App. E. Prior to July 3, 1991, the District Court had not ruled on any issue going to PGE's defenses. PGE could not have had any inkling of the "direction of the court" when it entered the settlement. The more plausible explanation is that PGE knew it did not have a lawful service territory allocation, and it wanted to stem the accrual of damages without admitting that it was breaking the law.

Finally, in October 1991, PGE and PP&L *reapplied* for exclusive service territories in Portland, this time under the appropriate statute, and expressly stating their intentions. In its order, the OPUC authorized the creation of the exclusive service territories by citing the appropriate statutes and using the

clear words "exclusive territorial allocation."[9] Columbia Steel does not dispute that since the 1992 Order, PGE and PP&L have had exclusive service territories in Portland.

REASONS FOR DENYING THE WRIT

I. The Rulings Below Were Neither Novel Nor Inconsistent With Supreme Court Rulings

A. The 1972 Order Did Not Sanction Anticompetitive Conduct

State action immunity requires that a monopolist's conduct be part of a clearly articulated and affirmatively expressed state policy to displace competition with regulation. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S.Ct. 937 (1980) (Midcal). Whether particular anticompetitive acts are "truly the product of state regulation" is the central focus of the test. Patrick v. Burget, 486 U.S. 94, 100, 108 S.Ct. 1658, 1662 (1988).

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[9] In contrast to the 1972 Order, the 1992 Order reads:

> To resolve any future ambiguity about the status of territorial allocations in Portland, the commission will include in this order a decision on the merits of the joint PGE/PP&L 1991 application in UA 41. The requirements of ORS 758.410 and [Or. Admin. R.] 860-25-010 have been satisfied and the Commission approves PGE's and PP&L's 1991 contract for allocation of territories and customers in Portland.

PGE App. at M-29.

"The exclusive territorial allocation to the area described as Parcel C of Appendix A to this order is confirmed to PGE."

Id. at M-32.

The Oregon legislature has decided that utilities may monopolize only if: (1) they enter into an Agreement providing for monopolization; and then (2) only if the OPUC issues an order permitting monopolization. The utilities intentionally modified their Agreement to avoid asking for an exclusive service territory. Pet. at 4. The Commission could only approve that for which the utilities had applied.[10] Consequently, and not surprisingly, the OPUC Order did not grant exclusive territories and the state action inquiry should end there. PGE asks this Court to ignore whether the state actually sanctioned its monopoly and, in the process, rewrite the state laws that establish a single means for allocating service territories.

PGE complains that analyzing the agency's order, in effect, grafts a second requirement onto the first leg of the test for state action immunity. Pet. at 17. To the contrary, the state statute is not self-effectuating. It is the statute (and not the Circuit Court) that imposes the requirement to analyze the OPUC Order. State law requires the OPUC expressly to decide whether to permit exclusive service territories. ORS 758.425(1), PGE App. R-5. To determine whether PGE's anticompetitive conduct is the product of state regulation, the trial court examined whether the OPUC authorized exclusive service territories. That authorization must come through an order of the OPUC. ORS 758.425(1), PGE App. R-5.

The lower courts properly insisted on clear and affirmative authorization in the 1972 OPUC Order. Any other rule would require "the sort of deconstruction of the governmental process and probing of official 'intent' that [this Court has] consistently sought to avoid." City of Columbia v.

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[10] ". . . [t]he commission shall enter an order either approving or disapproving the application as filed, or as amended. . . ." ORS 758.440(1); PGE App. R-6.

Omni Outdoor Advertising, Inc., 499 U.S. 365, 377, 111 S.Ct. 1344, 1352 (1991) (Omni).[11]

Contrary to PGE's arguments, the lower courts' analysis is consistent with the decisions in Federal Trade Comm'n v. Ticor Title Ins. Co., 504 U.S. 621, 112 S.Ct. 2169 (1992) (Ticor), and Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 105 S.Ct. 1721 (1985) (Southern). In those cases, inquiries into the meaning of administrative orders were unnecessary because there was no doubt that the private conduct at issue was authorized.

The challenged restraint in both Ticor and Southern was collective pricing by private actors. State statutes, rather than administrative agencies, expressly or impliedly authorized the collective pricing. Ticor, 504 U.S. at 629, 112 S.Ct. at 2174; Southern, 471 U.S. at 63, 105 S.Ct. at 1730. There was no doubt that the rates that were the product of collective

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[11] Professors Areeda and Turner agree that the clear articulation requirement should apply whenever the state acts through its administrative agencies.

> [T]he determination of both the meaning of state approval and the extent of state authorization must be subject to a clear statement requirement. Adoption of a policy requiring a state to make a clear statement of its intention to supplant competition reconciles the interests of the states in adopting non-competitive policies with the strong national policy favoring competition, and is consistent with the canon of federal statutory construction that exemptions to the antitrust laws are not to be lightly inferred. Where there is no other indication of the proper scope of an officer's authority or the meaning of state approval, a clear statement requirement is the best approach, because it ensures that the strong federal policy embodied in the antitrust laws will not be set aside where not intended by the state, and yet also guarantees that the state will not be prevented by the antitrust laws alone from supplanting those laws as long as it makes its purpose clear.

P. Areeda & D. Turner, I Antitrust Law ¶ 214e, at 91-92 (1978) (footnote omitted).

ratemaking had been approved by the state officials charged with approving those rates. Ticor, 504 U.S. at 629-30, 112 S.Ct. 2174-75; Southern 471 U.S. at 50-51, 105 S.Ct. at 1723. Indeed, the plaintiff in Ticor had conceded that the first leg of Midcal was satisfied, and the only issue was the adequacy of the regulatory scrutiny of the rates. Ticor 504 U.S. at 631-32, 112 S.Ct. at 2175-76.[12]

This case does not present factual circumstances such as those addressed in Ticor or Southern. The OPUC had authority to approve anticompetitive conduct (on a proper application). The question here is whether, in fact, the agency authorized that conduct; that is, "if the displacement [of competition] is both intended by the State and implemented in its specific details." Ticor, 504 U.S. at 633, 112 S.Ct. at 2176. The 1972 Order had to "clearly articulate and affirmatively express" the intent to displace competition but it fell well short of that standard.

B. This Is Not A Question Of Active Supervision

PGE claims that an examination of the OPUC's actions is part of "active supervision" and cannot be considered as part of the first leg of the Midcal test. PGE's view of the Oregon statute is completely at odds with this Court's prior insistence on a clear and affirmative (not passive) sanctioning of anticompetitive behavior.

PGE never advanced its active supervision argument based on Ticor in the District Court or in its initial briefs on the merits in the Circuit Court. PGE raised this argument for the first time on rehearing, after the Circuit Court had ruled that Columbia Steel could not pursue arguments based on the

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[12] PGE misstates the circumstances in Ticor when it asserts, "the uniform rates that the insurers had agreed upon had not been sufficiently authorized by the responsible state agencies. . . ." Pet. at 17. The problem in Ticor was the level of scrutiny of the rates; there was no question that the appropriate state actors had approved the rates.

absence of active supervision. See PGE App. C-18. PGE may not fairly claim for the first time on appeal that scrutiny of the order is more properly a part of the active supervision leg, but that Columbia Steel is precluded from arguing the absence of active supervision.

Moreover, PGE is simply wrong. As noted above, the question in Ticor was whether the states required and exercised sufficient scrutiny of insurance rates, not whether the regulators had approved the rates. Moreover, Ticor states that both legs of the Midcal test are to ensure that *particular* anticompetitive acts are part of a deliberate and intended state policy. 504 U.S. at 636, 112 S.Ct. at 2178. Unless approval of anticompetitive conduct by an administrative agency was affirmative and clear,[13] it cannot be the basis of antitrust immunity. That is the principle distilled from this Court's precedents, and it is the rule that the lower courts in this case followed.

C. OPUC's Post-1972 Actions Do Not Insulate PGE

This Court has frequently expressed its reluctance to explore intent of state officials. E.g., Omni, 499 U.S. at 377, 111 S.Ct. at 1352. The position that PGE advocates invites and requires the Court to do just that. As demonstrated below, such an exercise would be fruitless for PGE.

Conceding that the 1972 order might not satisfy the first leg of the Midcal test, PGE argues that subsequent conduct of the OPUC demonstrates (1) that the OPUC intended to create an exclusive service territory in 1972; and (2) the OPUC

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[13] Of course, the agency cannot issue such approval acting alone. It must do so pursuant to a clearly articulated and affirmatively expressed state policy to sanction anticompetitive conduct. See Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48, 62-63, 105 S.Ct. 1721, 1729-30; Goldfarb v. Virginia, 421 U.S. 773, 790, 95 S.Ct. 2004, 2014 (1975).

prohibited competition after 1972. Both assertions are refuted by the facts of record recounted at pages 3 through 12 above.

When state legislatures delegate broad authority to regulate, particular anticompetitive acts dictated or permitted by regulators will be immune from antitrust liability, notwithstanding the absence of express statutory authorization. E.g., Omni, 499 U.S. at 372-73, 111 S.Ct. at 1350; Southern, 471 U.S. at 64-65, 105 S.Ct. at 1731. That is not the case here. Unlike the situation in Omni and Southern, PGE's liability was not premised upon the state's "failure to describe the implementation of its policy in detail". Southern 471 U.S. at 65, 105 S.Ct. at 1731. The State of Oregon enacted a single procedure for implementing its policy by establishing a specific step by step process for creating exclusive service territories. PGE's liability is premised on its intentional failure to follow the State's clear procedure

Basing antitrust immunity on the OPUC's alleged acquiescence in monopolistic conduct would effectively rewrite Oregon law. This is precisely the result Ticor portended and rejected. In speaking of the consequences of displacing competition with regulation, the Court explained,

> States must accept political responsibility for actions they intend to undertake. It is quite a different matter, however, for federal law to compel a result that the States do not intend but for which they are held to account . . . . For states which do choose to displace the free market with regulation, our insistence on real compliance with both parts of the Midcal test will serve to make clear that the State is responsible for the price fixing it has sanctioned and undertaken to control.

Ticor, 504 U.S. at 636, 112 S.Ct. at 2178.

The Oregon legislature determined that the OPUC must announce its intent to displace competition through an order issued under ORS Chapter 758. Permitting subsequent active supervision alone to supplant a clear authorization of anticompetitive conduct would effectively expand the circumstances under which state law permits territorial allocations. As this Court has observed, "[a]ctivities which come under the jurisdiction of a regulatory authority nevertheless may be subject to scrutiny under the antitrust laws." Otter Tail Power Co. v. United States, 410 U.S. 366, 372, 93 S.Ct. 1022, 1027 (1973). The state action doctrine cannot be applied in a manner that substitutes mere active supervision for the requirement of a clear articulation of the state's intent to permit monopolization. Moreover, a state agency cannot, through acquiescence, validate otherwise unlawful conduct.

D. The Lower Courts Did Not Violate Principles Of Full Faith and Credit

A state may not immunize past anticompetitive conduct simply by declaring it to be lawful. Ticor, 504 U.S. at 633, 112 S.Ct. at 2176 ("a State may not confer antitrust immunity on private persons by fiat . . . ."); Town of Hallie v. City of Eau Claire, 471 U.S. 34, 39, 105 S.Ct. 1713, 1716 (1985) (Hallie) ("the State may not validate a [monopolist's] anticompetitive conduct simply by declaring it to be lawful"); Parker v. Brown, 317 U.S. 341, 351, 63 S.Ct. 307, 314 (1943) (Parker) (a state may not "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."). Concluding that the Oregon court's cursory review substitutes for prior clear articulation, as PGE requests, would jettison this fundamental rule from antitrust jurisprudence.

In 1992, the OPUC attempted to create an exclusive service territory for PGE and PP&L retroactive to 1972 by issuing a *nunc pro tunc* order declaring what the 1972

Commissioner had intended. PGE App. N. Over Columbia Steel's objection, the OPUC declared that intent without holding an evidentiary hearing or even considering the overwhelming evidence to the contrary (such as the testimony of Mr. Sabin discussed at pages 8-9, supra). An Oregon trial court ruled, without any evidentiary hearing, that there was "substantial evidence" to support the OPUC's Order. PGE App. O. The trial court was affirmed without opinion. PGE App. P.

PGE claims that the federal courts must now be compelled to forego antitrust scrutiny on the basis of the doctrine of "full faith and credit." PGE bases its assertion on the state court's orders which facially do not deal with the antitrust issues in contention in the Federal Courts. The OPUC's declaration as to the intent of a 20-year old order is not a state sanction of anticompetitive conduct. Instead, it is an attempt to "validate a [monopolist's] anticompetitive conduct simply by declaring it to be lawful." Hallie, 471 U.S. at 39, 105 S.Ct. at 1716; Parker, 317 U.S. at 351, 63 S.Ct. at 314.

Moreover, the state proceedings addressed different issues. Without a hearing before the OPUC, and without trial, the only Court articulating its rationale applied an administrative law standard to determine that the OPUC Orders "are supported by substantial evidence. . . ." PGE App. O-2. States do not determine whether immunity from the federal antitrust laws arises; that determination is for the federal courts. See Hallie, 471 U.S. at 44 n.8, 105 S.Ct. at 1719 n.8 (decision of Wisconsin Supreme Court does not decide question of state action immunity, although it may be "instructive" on questions of legislative intent). The federal courts' antitrust analysis focuses on whether the state sanctioned anticompetitive conduct *before* that conduct occurred. What the state does 20 years after the private monopolists divided their markets, and after the plaintiff's antitrust injury has been sustained, is unimportant. Issues of full faith and credit simply do not arise under the unique circumstances of this case where the OPUC attempted to validate, after the fact, PGE's anticompetitive conduct.

E. No Conflict Among The Circuits Exists

1. Praxair

The Ninth Circuit's decision in this case does not conflict with the Eleventh Circuit's opinion in Praxair, Inc. v. Florida Power & Light Co., 64 F.3d 609 (11th Cir. 1995), *cert. denied*, __U.S.__, 116 S.Ct. 1678 (1996) (Praxair). Both opinions applied the same principles of antitrust immunity. The different results are due to differences in facts: clear authorization of anticompetitive conduct was present in the Praxair case and absent in this case.

In Praxair, as in this case, antitrust immunity turned on whether the state clearly authorized and affirmatively expressed its approval of a territorial market division between two electric utilities. 64 F.3d at 611. The relevant state action was an order of the state utility regulatory commission. Id. The Praxair court focused its attention on whether specific territory had been included in the state Commission's order. The Court expressly cited language from the state Commission's order which "allow[ed the utilities] to agree not to serve within certain areas when requested to do so by a person applying for electrical service. . . " 64 F.3d at 612. The Court concluded "[n]either utility could deviate from the order without prior approval of the Commission." Id. The Court reviewed the order and its exhibits to interpret the order (and not the subsequent Commission acts) as allocating disputed territory and therefore concluded that the order sanctioned the challenged anticompetitive conduct.

As did the Eleventh Circuit in Praxair, the Ninth Circuit in this case confined its analysis to the administrative order that completes the relevant state action. Unlike Praxair, the order in this case did not sanction anticompetitive conduct, either expressly or by implication.

In dicta, Praxair suggested that the parties' conduct after the administrative order was issued was relevant in determining whether the state sanctioned anticompetitive conduct. The court characterized its analysis as a factual inquiry. 64 F.3d at 612. A similar factual inquiry conducted in this case reveals striking dissimilarities with Praxair: (1) to obtain the necessary approval from the City of Portland, PGE and PP&L intentionally removed language from their Agreement that would call for exclusive service territories -- there was no innocent misunderstanding; (2) the District Court found, and the Circuit Court agreed, that the 1972 Agreement and the OPUC order never approved exclusive service territories; and (3) the utilities and the OPUC itself expressed doubts as to the creation of exclusive service territories after 1972. The unique facts of this case make Praxair inapplicable.

2. Lease Lights

The Circuit Court's decision is consistent with the Tenth Circuit Court of Appeal's decision in Lease Lights, Inc. v. Public Serv. Co. of Oklahoma, 849 F.2d 1330 (10th Cir. 1988) (Lease Lights). Lease Lights addressed circumstances in which a state regulatory commission expressly *required* the utility to collect the rates that plaintiffs claimed resulted in predatory pricing. 849 F.2d at 1334 ("the lower rates charged by PSO which the plaintiffs claim destroyed their business, was compelled by an independent decision of the Commission that PSO could not disobey."). Here, the OPUC never exercised its authority to sanction anticompetitive conduct and the type of clear authorization of conduct found in Lease Lights simply cannot be found. The Lease Lights case is inapposite.

In the case presently before this Court, there was no good faith reliance on the exercise of regulatory authority. As discussed above, the OPUC did not act in 1972 to prevent the two utilities from competing, and indeed PGE ultimately agreed, without prior OPUC approval, to permit PP&L to serve Columbia Steel.

F. The Issues In This Case Arise Infrequently

This case presents a discrete set of facts, not likely to repeat themselves. State law permits an administrative agency to determine on a case-by-case basis whether, and in what parts of the state, competition should be eliminated. While that might not be unusual, the question presented is whether that agency said "yes" or "no" to competition. Very few state action cases arise from highly specific, case-by-case determinations by administrative agencies, such as the 1972 Order.

The dearth of such cases is not surprising. Administrative agencies speak through their orders. When an administrative agency acts on the application of a regulated industry, the order will either say either "yes" or "no" to the application, and there is no question whether the state sanctioned the anticompetitive conduct at issue. The OPUC's 1972 Order expressly authorizing an exclusive service territory in Rainier, and the OPUC's 1992 Order expressly granting exclusive service territories to PGE and PP&L in Portland illustrate that point. It is not difficult to obtain a clear order granting exclusive territories if the legislatively mandated process for doing so is followed. Facts like these do not arise often, and the decisions in such cases are necessarily fact-specific. The Court can anticipate few cases presenting issues similar to those of this case.

Even fewer such cases will appear in the future. The few cases that address state action immunity arising from an agency's ruling on a specific application arise in the context of utility regulation. Public utilities have a unique relationship to the public, and since the early 1900s, state legislatures have perceived a need for intense scrutiny of utility operations to protect the public. But the utility industry is changing dramatically. Nearly every state is considering or implementing measures to deregulate utilities and to displace regulation with competition. See, e.g., Benjamin J. Holden, Electric-Deregulation Machine Picks Up Steam, Wall St. J.,

July 14, 1997, at B4. With the deregulation of electric and natural gas utilities, cases addressing whether a state statute or a regulatory body sanctioned exclusive service territories will be increasingly rare.

G. The Result Is Fair

Finally, PGE complains that it was "fundamentally unjust" to deny PGE a jury trial on the question of PGE's intent. Pet. at 30. To the best of Columbia Steel's knowledge, none of the parties below, *including PGE* requested a jury trial in the manner required by the District Court's Local Rules 120-1 (g)(3) and 200-2. PGE therefore, waived its right to a jury trial. Fed. R. Civ. P. 38(d). Moreover, PGE did not raise this "fundamentally unjust" issue before the Circuit Court. Again it has waived its right to assert the need for a jury trial and to contend before this Court that it was error to decide the state action question without submitting it to a jury.

In any event, and perhaps more importantly, PGE acknowledges that there are no material facts in dispute. Pet. at 2. The central issues in this case were decided on *cross-motions* for summary judgment -- PGE itself agreed in its pleadings that the material facts were not in dispute. The District Court granted summary judgment because it concluded that any sanction of the admitted conspiracy to monopolize would have to be found in the operative OPUC Order. Thus, there is no factual issue to try. Based on PGE's own admissions of fact, the result is fair and consistent with this Court's precedent.

PGE invites this Court to abandon its "clearly articulated and affirmatively expressed" bright line test in favor of a "subjective judgment" test. If PGE succeeds, then sellers, buyers and regulators will never know in advance whether a claimed right to monopolize is enforceable. Such a result would be a new, judicially created exception to the antitrust laws that would require probing into unknowable subjective beliefs and

yield uncertainty amongst consumers, competitors, regulators, and even the monopolists themselves. The Court should reject PGE's invitation.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX TO
RESPONDENT'S BRIEF IN OPPOSITION

BEFORE THE

PUBLIC UTILITY COMMISSIONER OF OREGON

In the Matter of the Joint Application of PACIFIC POWER & LIGHT COMPANY and PORTLAND GENERAL ELECTRIC COMPANY for an order(s) (1) approving and authorizing the exchange of electric utility facilities located in Multnomah and Columbia Counties, Oregon; and (2) approving the assignment to Portland General Electric Company of certain service territory in Columbia County, Oregon, previously allocated to Pacific Power & Light Company.	)	DOCKET NO. U-F- APPLICATION

Pacific Power & Light Company, a Maine corporation (hereinafter called "Pacific"), and Portland General Electric Company, an Oregon corporation (hereinafter called "Portland General"), hereby apply for an order of the Public Utility Commissioner of Oregon (hereinafter called the "Commissioner"), pursuant to the provisions of Chapter 757 ORS, authorizing Pacific and Portland General to exchange certain electric utility facilities located in Multnomah and Columbia Counties, Oregon, all as hereinafter set forth:

PACIFIC POWER & LIGHT COMPANY

(a) Exact Name of Applicant and Address of Principal Business Office:

Pacific Power & Light Company
Public Service Building
Portland, Oregon - 97204

(b) State in which Incorporated, Date of Incorporation, and Other States in which Authorized to Transact Utility Operations:

Pacific was incorporated under the laws of the State of Maine on June 16, 1910, and has qualified to do business as a foreign corporation in the States of Oregon, Wyoming, Washington, California, Montana and Idaho.

(c) Name and Address of Person Authorized to Receive Notices and Communications in Respect to this Application:

Notices and communications with respect to this Application should be sent to:

H. W. Millay, Secretary
Pacific Power & Light Company
Public Service Building
Portland, Oregon - 97204

The Commissioner is respectfully requested to send copies of all such notices and communications to:

Robert F. Harrington
Rives, Bonyhadi & Hall
1400 Public Service Building
Portland, Oregon - 97204

(d) Names, Titles and Addresses of Principal Officers:

Glenn L. Jackson Chairman of the Board	Public Service Building Portland, Oregon 97204
Don C. Frisbee President	Public Service Building Portland, Oregon 97204
John Y. Lansing Executive Vice President	Public Service Building Portland, Oregon 97204
George L. Beard Senior Vice President	Public Service Building Portland, Oregon 97204
Allan C. Bartholomew Senior Vice President	Public Service Building Portland, Oregon 97204
Howard Arnett Vice President	Post Office Box 860 Casper, Wyoming 82602
C. P. Davenport Vice President	Public Service Building Portland, Oregon 97204
G. Eldon Drennan Vice President	Public Service Building Portland, Oregon 97204
John H. Geiger Vice President	Public Service Building Portland, Oregon 97204
A. M. Gleason Vice President	Public Service Building Portland, Oregon 97204
Philip G. Humphreys Vice President	Public Service Building Portland, Oregon 97204
R. B. Lisbakken Vice President	Public Service Building Portland, Oregon 97204

R. W. Moench Vice President	Post Office Box 860 Casper, Wyoming 82602
Jack T. Stiles Vice President	Public Service Building Portland, Oregon 97204
E. O. Thoman Vice President	Post Office Box 1288 Yakima, Washington 98901
H. W. Millay Secretary	Public Service Building Portland, Oregon 97204

(e) General Character of Business with Designation of Territories Served:

Pacific is an operating public utility engaged principally in the business of generating, purchasing, transmitting, distributing and selling electric energy in Oregon, Wyoming, Washington, California, Montana and Idaho.

Pacific also supplies water, steam heat and telephone service in various communities in its service area.

For further information with regard to the general character of Pacific's business and the territory served by it, reference is made to Pacific's Annual Reports to the Commissioner and other documents and data pertinent to Pacific on file in the office of the Commissioner.

(f) Pacific's Capital Stock:

For statement as to classes and series of capital stock as of December 31, 1971, reference is made hereby to Item (f) in Applicant's Application to the Commissioner dated March 2, 1972, for authority to offer, issue and sell shares of its Common Stock, Docket No. U-F-2923.

(g) Pacific Long-Term Debt:

For statement as to classes and series of long-term debt and notes, reference is made hereby to Item (g) in Applicant's Application to the Commissioner dated March 2, 1972, referred to in Item (f) hereof.

PORTLAND GENERAL ELECTRIC COMPANY

(a) Exact Name of Applicant and Address of Principal Business Office:

Portland General Electric Company
Electric Building
Portland, Oregon 97205

(b) State in which Incorporated and Date of Incorporation:

Portland General Electric Company was incorporated under the laws of the State of Oregon on July 25, 1930, for perpetual duration. It is qualified and transacts business only in the State of Oregon.

(c) Name and Address of Person Authorized to Receive Notices and Communications in Respect to this Application:

Notices and communications with respect to this Application should be sent to:

Warren Hastings
Portland General Electric Company
621 S. W. Alder Street
Portland, Oregon 97205

(d) Names, Titles and Addresses of Principal Officers:

Frank M. Warren President	621 S. W. Alder Street Portland, Oregon 97205
Hilbert S. Johnson Senior Vice President	621 S. W. Alder Street Portland, Oregon 97205
Ralph H. Millsap Senior Vice President	621 S. W. Alder Street Portland, Oregon 97205
A. J. Porter Senior Vice President	621 S. W. Alder Street Portland, Oregon 97205
Robert H. Short Senior Vice President and Treasurer	621 S. W. Alder Street Portland, Oregon 97205
H. H. Phillips Vice President, Corporate Counsel and Secretary	621 S. W. Alder Street Portland, Oregon 97205
Estes Snedecor, Jr. Vice President	621 S. W. Alder Street Portland, Oregon 97205
F. D. Wieden Vice President	621 S. W. Alder Street Portland, Oregon 97205
J. L. Williams Vice President	621 S. W. Alder Street Portland, Oregon 97205
Carrol W. Brissenden Assistant Vice President	621 S. W. Alder Street Portland, Oregon 97205

Edgar F. Wildfong Assistant Vice President	621 S. W. Alder Street Portland, Oregon 97205
Harry L. Clark Controller and Assistant Treasurer	621 S. W. Alder Street Portland, Oregon 97205
James L. Staines Assistant Treasurer	621 S. W. Alder Street Portland, Oregon 97205
John J. Coughlin Assistant Secretary	621 S. W. Alder Street Portland, Oregon 97205
Warren Hastings Assistant Secretary	621 S. W. Alder Street Portland, Oregon 97205

(e) General Character of Business with Designation of Territories Served:

Portland General is engaged in the generation, purchase, transmission, distribution and sale of electric energy for public use in Clackamas, Columbia, Hood River, Jefferson, Marion, Multnomah, Polk, Washington and Yamhill Counties, Oregon, and has acquired a 2-1/2% interest in a coal-fired generating facility near Centralia, Washington. Reference is made to the map showing territory served, filed by the Applicant on October 20, 1971, as a part of Exhibit I (Registration Statement filed with the Securities and Exchange Commission) with the Public Utility Commissioner of Oregon in Docket U-F-2892.

(f) Portland General's Capital Stock:

Reference is made to Portland General's Application to the Commissioner docketed as U-F-2935.

(g) Portland General's Long-Term Debt:

Reference is made to Portland General's Application to the Commissioner docketed as U-F-2935.

I.

DISPOSITION OF FACILITIES

This Application is for an order of the Commissioner approving and authorizing (1) the transfer by Pacific to Portland General of certain electric utility facilities and properties owned, operated and maintained by Pacific in the Cities of Portland and Rainier, Oregon, and in adjacent areas of Multnomah and Columbia Counties, and (2) the transfer by Portland General to Pacific of certain electric utility facilities and properties owned, operated and maintained by Portland General in the City of Portland and adjacent areas of Multnomah County, Oregon. The properties to be exchanged and their locations are described and shown in Exhibits A through H to an Agreement between Pacific and Portland General, dated July 18, 1972, designated as Exhibit I to this Application, and by this reference made a part hereof.

1. Description of Facilities

Pacific will transfer to Portland General (1) certain electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities, and all easements necessary for the operation thereof, owned, operated and maintained by Pacific in the area designated as Pacific's Rainier Service District, and (2) facilities and properties of the same character owned, operated and maintained by Pacific in portions of the City of Portland and areas adjacent thereto. Said facilities and properties are described and shown in Exhibits A, B, C, D, E and G to the aforementioned Agreement, Exhibit I hereto.

Portland General will transfer to Pacific certain electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities, and all easements necessary for the operation thereof, owned, operated and maintained by Portland General within portions of the City of Portland and areas adjacent thereto. Said facilities and properties are described and shown in Exhibits A, B, D, E and H to the aforementioned Agreement, Exhibit I hereto.

Approximately 28,000 customers are served by the facilities to be transferred by Pacific to Portland General, and approximately 38,000 customers are served by the facilities to be transferred by Portland General to Pacific. Pacific and Portland General will continue to operate the facilities acquired from the other in the same manner as heretofore.

2. Cost of Facilities (by Primary Account)

Transferred by Pacific to Portland General:

To be furnished upon completion of inventory of facilities.

Transferred by Portland General to Pacific:

To be furnished upon completion of inventory of facilities.

3. Applications to Other Regulatory Bodies

Pacific Power & Light Company will file with the Federal Power Commission an Application seeking an order authorizing the transfer by Portland General to Pacific of the facilities and properties described herein.

4. Transfer Consistent with Public Interest

The City of Portland, by Ordinance No. 134416, passed April 26, 1972, effective May 26, 1972, consented to the exchange by Portland General and Pacific of those facilities located in Portland described herein.

As a result of the proposed exchange and sale of property, uneconomical duplication of services and facilities will be minimized. Presently, lines of Pacific and Portland General intersect, and each company serves customers within areas served by the other. Approval ot his [sic] Application will result in more cohesive operating units and will enable Pacific and Portland General to render a more efficient and economical electric utility service to their respective customers.

6. Reasons for Exchange of Facilities

For reasons for the proposed exchange of facilities and benefits to be derived by customers of Pacific and Portland General, and the public, reference is made to the information set forth in Paragraph 5 hereof.

7. Amount of Securities Owned by Applicants of Utilities from which Securities are Proposed to be Acquired

Not applicable.

8. Franchises

Both Applicants are authorized to provide electric service in the City of Portland. Pacific holds a franchise to provide electric service in the City of Rainier, expiring April 18, 1981, and will assign said franchise to Portland General. Portland General holds a franchise to provide electric service in the City of Maywood Park, expiring August 1, 1977, and will assign said franchise to Pacific.

The laws of Oregon authorize Applicants to construct and maintain lines conveying electric energy along the public roads outside municipal corporations, together with the necessary fixtures therefor, subject to the right of the State Highway Commission with regard to State highways and County courts or County Commissioners with respect to County roads, to designate the location upon such highways and roads where such fixtures may be located.

II

ASSIGNMENT OF SERVICE TERRITORY

This Application is further for an order of the Commissioner, pursuant to the provisions of ORS 758.460, approving the assignment to Portland General of all rights acquired by Pacific in and to certain service territory allocated to Pacific as its exclusive service territory by the Commissioner's Order No. 38498 dated October 16, 1962, Docket No. 2332. The territory sought to be assigned is shown in Exhibit 1 hereto and described in Exhibit 2 hereto; the proposed instrument of Assignment is attached as Exhibit 3 hereto, and a copy of a franchise granted to Pacific to provide electric utility service in the City of Rainier, which franchise will be assigned to Portland General, is attached as Exhibit 4 hereto. Said Exhibits 1, 2, 3 and 4 are by this reference made a part hereof.

PACIFIC'S EXHIBITS

The following exhibits of Pacific are made Exhibits to this Application:

Exhibit	Incorporated by reference to: Docket Number	Exhibit	
A	U-F-2885	A	Composite Certificate of Organization of Applicant as last amended on June 10, 1971.
B	U-F-2885	B	By-Laws of Applicant, as last amended on June 15, 1971.
C			Resolutions adopted by the Board of Directors of Applicant authorizing the transactions to which this Application relates.
D-1	U-F-1452	1(7)	Mortgage and Deed of Trust, dated as of July 1, 1947, from Applicant to Guaranty Trust Company of New York (now Morgan Guaranty Trust Company of New York) as Corporate Trustee.

Exhibit	Incorporated by reference to: Docket Number	Exhibit	
D-2	U-F-1496	2	Applicant's First Supplemental Indenture, dated as of April 1, 1950.
D-3	U-F-1646	6	Applicant's Second Supplemental Indenture, dated as of March 1, 1952.
D-4	U-F-1690	3	Applicant's Third Supplemental Indenture, dated as of September 1, 1952.
D-5	U-F-1795	3	Applicant's Fourth Supplemental Indenture, dated as of April 1, 1954.
D-6	U-F-1827	3	Applicant's Fifth Supplemental Indenture, dated as of August 1, 1954.
D-7	U-F-1910	3	Applicant's Sixth Supplemental Indenture, dated as of October 1, 1955.

Exhibit	Incorporated by reference to: Docket Number	Exhibit	
D-8	U-F-2002	5	Applicant's Seventh Supplemental Indenture, dated as of January 1, 1957.
D-9	U-F-2056	4	Applicant's Eighth Supplemental Indenture, dated as of September 1, 1957.
D-10	U-F-2085	5	Applicant's Ninth Supplemental Indenture, dated as of January 1, 1958.
D-11	U-F-2133	4	Applicant's Tenth Supplemental Indenture, dated as of July 1, 1958.
D-12	U-F-2257	4	Applicant's Eleventh Supplemental Indenture, dated as of September 1, 1960.
D-13	U-F-2281	G	Applicant's Twelfth Supplemental Indenture, dated as of June 22, 1961.

Exhibit	Incorporated by reference to: Docket Number	Exhibit	
D-14	U-F-2326	E	Applicant's Thirteenth Supplemental Indenture, dated as of April 1, 1962.
D-15	U-F-23-54	E	Applicant's Fourteenth Supplemental Indenture, dated as of December 1, 1962.
D-16	U-F-2355	E	Applicant's Fifteenth Supplemental Indenture, dated as of April 1, 1963.
D-17	U-F-2395	D	Applicant's Sixteenth Supplemental Indenture, dated as of August 1, 1963.
D-18	U-F-2458	D	Applicant's Seventeenth Supplemental Indenture, dated as of October 1, 1964.
D-19	U-F-2513	D	Applicant's Eighteenth Supplemental Indenture, dated as of October 1, 1965.

	Incorporated by reference to:		
Exhibit	Docket Number	Exhibit	
D-20	U-F-2708	D-20	Applicant's Nineteenth Supplemental Indenture, dated as of December 15, 1967.
D-21	U-F-2760	D	Applicant's Twentieth Supplemental Indenture dated as of May 1, 1969.
D-22	U-F-2774	D	Applicant's Twenty-First Supplemental Indenture, dated as of November 1, 1969.
D-23	U-F-2817	D	Applicant's Twenty-Second Supplemental Indenture, dated as of July 1, 1970.
D-24	U-F-2848	D	Applicant's Twenty-Third Supplemental Indenture, dated as of February 1, 1971.
D-25	U-F-2885	D	Applicant's Twenty-Fourth Supplemental Indenture, dated as of October 1, 1971.

Exhibit	Incorporated by reference to: Docket Number	Exhibit	
D-26	U-F-2193	1-R Sec 8 [1]	Indenture, dated as of October 1, 1941, from the former Rawlins Electric Company to Irving Trust Company, as Trustee.
D-27	U-2193	1-R Sec 8 [1]	Rawlins Second Supplemental Indenture, dated as of November 1, 1955.
D-28	U-F-2193	1-R Sec 8 [1]	Rawlins Third Supplemental Indenture, dated as of November 1, 1957.
D-29	U-F-2200	6	Debenture Agreement, dated as of September 1, 1959, between Applicant and

[1] Principal provisions of Mortgage and Supplemental Indentures summarized in Section 8 of the Statement of Financial Condition of Rawlins Electric Company filed pursuant to Rule 2.107 of the Commissioner's then effective Rules and Regulations as Exhibit 1-R in said Docket No. U-F-2193. Extra copies of Exhibits D-25, D-26 and D-27 are not available for filing with the Commissioner. Applicant hereby agrees to mail copies of each such instrument available to the Commissioner for his examination, upon request. Securities outstanding under the provisions of the Rawlins Indenture, as supplemented, do not exceed 5%, of the total assets of Applicant.

Exhibit	Incorporated by reference to: Docket Number	Exhibit	
			The Chase Manhattan Bank, as Trustee.
D-30	U-F-2458	D-23	First Supplemental Indenture, dated as of June 22, 1961, to said Debenture Agreement.
D-31	U-F-2708	D-31	Credit Agreement, dated as of April 1, 1968, between Applicant and the banks named therein.
D-32	U-F-2885	D-30	Credit Agreement, dated as of June 30, 1971, between Applicant and the banks named therein.
E			See Applicant's latest Balance Sheet on file with the Commissioner.
F			Not applicable. Applicant has no contingent liabilities.

Exhibit	Incorporated by reference to: Docket Number	Exhibit	
G			See Applicant's latest Income Statement on file with the Commissioner.
H			See Applicant's latest Surplus Statement on file with the Commissioner.
I			Copy of Agreement between Applicants Pacific Power & Light Company and Portland General Electric Company.
J			Proposed Journal Entries.
K			Not applicable.

PORTLAND GENERAL'S EXHIBITS

The following exhibits of Portland General are made Exhibits to this Application:

Exhibit	Incorporated by reference to: Docket Number	Exhibit	
A	U-F-2471	A	Articles of Incorporation of Portland General Electric Company with all amendments.
B	U-F-2471		Bylaws of Portland General Electric Company as last amended on February 8, 1966.
C			Resolution adopted by the Board of Directors of Portland General Electric Company, authorizing the transaction to which this Application relates.
D-1	U-F-1155		Indenture of Mortgage and Deed of Trust, dated July 1, 1945, from Portland General Electric Company to The Marine Midland Trust Company of New York (now known as Marine Midland Grace Trust Company of New York).
D-2	U-F-1323		First Supplemental indenture dated November 1, 1947.
D-3	U-F-1401		Second Supplemental Indenture dated November 1, 1948.
D-4	U-F-1682		Third Supplemental indenture dated May 1, 1952.

Exhibit	Incorporated by reference to: Docket Number	Exhibit	
D-5	U-F-1769		Fourth Supplemental Indenture dated November 1, 1953.
D-6	U-F-1845		Fifth Supplemental Indenture dated November 1, 1954.
D-7	U-F-1980		Sixth Supplemental Indenture dated September 1, 1956.
D-8	U-F-2036		Seventh Supplemental Indenture dated June 1, 1957.
D-9	U-F-2081	2	Eighth Supplemental Indenture dated December 1, 1957.
D-10	U-F-2247	2	Ninth Supplemental Indenture dated June 1, 1960.
D-11	U-F-2310	2	Tenth Supplemental Indenture dated November 1, 1961.
D-12	U-F-2366	D	Eleventh Supplemental Indenture dated February 1, 1963.
D-13	U-F-2390	D	Twelfth Supplemental Indenture dated, June 1, 1963.
D-14	U-F-2427	D	Thirteenth Supplemental Indenture dated April 1, 1964.

Exhibit	Incorporated by reference to: Docket Number	Exhibit	
D-15	U-F-2471	D	Fourteenth Supplemental Indenture dated March 1, 1965.
D-16	U-F-2574		Fifteenth Supplemental Indenture dated June 1, 1966.
D-17	U-F-2666		Sixteenth Supplemental Indenture dated October 1, 1967.
D-18	U-F-2803		Seventeenth Supplemental Indenture dated April 1, 1970.
D-19	U-F-2833		Eighteenth Supplemental Indenture dated November 1, 1970.
D-20	U-F-2136	2	5% Sinking Fund Debenture Agreement, dated June 1, 1958, from Portland General Electric Company to The Chase Manhattan Bank, Trustee.
E			See Portland General Electric Company's latest Balance Sheet on file with the Commissioner.
F			A Statement of Contingent Liabilities as of December 31, 1971. See notes to Balance

Exhibit	Incorporated by reference to: Docket Number	Exhibit	
			Sheet on file with Commissioner.
G			See Portland General Electric Company's latest Income Statement on file with the Commissioner.
H			See Portland General Electric Company's latest Surplus Statement on file with the Commissioner.
I			Copy of proposed Journal Entries to be used to record the transaction upon Portland General Electric Company's books.

ASSIGNMENT EXHIBITS

The following exhibits in connection with the Assignment of Service Territory are made Exhibits to this Application:

Exhibit Number	Description
1	Territory sought to be assigned to Portland General Electric Company by Pacific Power & Light Company,

previously allocated to Pacific Power & Light Company as its exclusive service territory by the Commissioner's Order No. 38498 dated October 16, 1962, Docket No. 2332.

2 Description of territory sought to be assigned to Portland General Electric Company by Pacific Power & Light Company.

3 Proposed instrument of Assignment covering territory sought to be assigned to Portland General Electric Company by Pacific Power & Light Company.

4 Franchise of Pacific Power & Light Company sought to be assigned to Portland General Electric Company, covering electric utility service in the City of Rainier, Oregon.

WHEREFORE, Applicants respectfully request that the Commissioner make and enter an Order granting this Application.

DATED at Portland, Oregon, this 25th day of July, 1972.

PACIFIC POWER & LIGHT COMPANY

By /s/ A. C. Bartholomew
A. C. Bartholomew
Senior Vice President

PORTLAND GENERAL ELECTRIC COMPANY

By /s/ Hilbert S. Johnson
Hilbert S. Johnson
Senior Vice President

RIVES, BONYHADI & HALL

By /s/ Robert F. Harrington
Robert F. Harrington

OFFICE AND POST OFFICE ADDRESS:

1400 Public Service Building
Portland, Oregon 97204
Telephone No: 224-3920

PHILLIPS, COUGHLIN, BUELL, STOLOFF & BLACK

By /s/ Warren Hastings
Warren Hastings

OFFICE AND POST OFFICE ADDRESS:

Electric Building
Portland, Oregon 97205
Telephone No: 222-9821

STATE OF OREGON)
) ss.
County of Multnomah)

I, A. C. BARTHOLOMEW, being first duly sworn, depose and say: That I am Senior Vice President of PACIFIC POWER & LIGHT COMPANY, one of the Applicants in the foregoing Application; that I have read said Application,

including the Exhibits thereto, and know the contents thereof, and the same is true to the best of my knowledge and belief.

/s/ A.C. Bartholomew

Subscribed and sworn to before me this 25th day of July, 1972.

/s/ illegible
Notary Public for Oregon
My Commission expires: 2/19/73

STATE OF OREGON)
) ss.
County of Multnomah)

I, HILBERT S. JOHNSON, being first duly sworn, depose and say: That I am Senior Vice President of PORTLAND GENERAL ELECTRIC COMPANY, one of the Applicants in the foregoing Application; that I have read said Application, including the Exhibits thereto, and know the contents thereof, and the same is true to the best of my knowledge and belief.

/s/ Hilbert S. Johnson

Subscribed and sworn to before me this 25th day of July, 1972.

/s/ Karin M. Burnham
Notary Public for Oregon
My Commission expires: 4-13-73

Exhibit 1	Map of Service Area Boundary [omitted--applies to Rainier, Oregon only]
Exhibit 2	Service Area Legal Description [omitted--applies to Rainier, Oregon only]
Exhibit 3	Assignment of Allocated Territory [omitted--applies to Rainier, Oregon only]
Exhibit 4	Ordinance No. 788 [omitted--applies to Rainier, Oregon only]